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NO. 28 1200

SUPREME COURT OF THE UNITED

STATES
CLERK

OCTOBER TERM, 1902

No. 228

CHICAGO BY-PRODUCT COKE COMPANY,

Appellant,

vs.

**THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND THE BELT RAIL-
WAY COMPANY OF CHICAGO ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.**

STATEMENT AS TO JURISDICTION.

**NUEL D. BELNAP,
JOHN S. BURCHMORE,
Counsel for Appellant.**



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IN THE
DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS EASTERN
DIVISION

IN EQUITY.

No. 15335

CHICAGO BY-PRODUCT COKE COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION, THE BELT RAILWAY COM-
PANY OF CHICAGO, CHICAGO & ILLINOIS WEST-
ERN RAILROAD, ILLINOIS CENTRAL RAILROAD
COMPANY,

Defendants.

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT AS TO JURISDICTION ON APPEAL.

The appellant, in support of jurisdiction of the Supreme Court of the United States to review the above entitled

case on appeal and in compliance with Rule 12 of the Rules of the Supreme Court, respectfully represents:

(A) Statutory Provisions Sustaining Jurisdiction.

It is provided in Title 28, U. S. C. A., Sections 46 and 47 (Chapter 32, 38 Stat. L. 220), that an action may be brought to set aside, in whole or in part, any order made or entered by the Interstate Commerce Commission by petition to any District Court of the United States, and that the judge of such District Court shall immediately call to his assistance to hear and determine the matter two other judges, one of whom shall be a Circuit Judge. It is also provided that an appeal may be taken direct to the Supreme Court of the United States.

Section 44 in the same chapter and title, provides that the procedure in respect to suits (a) for the enforcement of and (b) to enjoin or suspend an order of the Interstate Commerce Commission, shall be as provided in Sections 45, 45a, 47, 47a and 48 of that Title.

Section 47a in the same title and chapter then provides as follows:

“A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.”

It is also provided by Section 345 of Title 28 (Chap. 426, 48 Stat. L. 926), that a direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had in certain classes of cases, including:

“suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.”

(B) Decree and Appeal.

The decree sought to be reviewed herein was entered April 27, 1938. A motion to modify said decree was received by the Court on May 25, 1938; and said motion was denied by an order of the Court dated June 13, 1938.

The petition for appeal was filed and order allowing the appeal was entered June 24, 1938.

(C) Nature of the Case and Ruling of the District Court.

This suit was brought by the appellant, Chicago By-Product Coke Company, under authority of an Act approved October 22, 1913 (38 Stat. L. 219; 28 U. S. C. A. Sec. 41, Subd. (28) and Sections 45, 46, 47), to enjoin, set aside, and annul a report and order entered by the Interstate Commerce Commission on May 28, 1936, in a proceeding known as *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, said report and order being subtitled Fifty-Sixth Supplemental Report of the Commission, *Chicago By-Product Coke Company Terminal Allowances*, 216 I. C. C. 8.

The order attached to this supplemental report is similar to others made in the same underlying proceeding and approved by the Supreme Court in *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402. It originally required the carrier defendants to cease and desist on or before July 17, 1936, and thereafter to abstain from the practice which they had previously followed for many years of paying an allowance of \$1.85 per car to the Chicago By-Product Coke Company for performing the service of switching cars between the interchange tracks and the loading and unload-

ing platforms at that industry, which practice was found preferential in said supplemental report. The effective date of the cease and desist order was postponed by the Commission to June 15, 1937, by orders subsequently entered on June 30, 1936, September 10, 1936, and February 26, 1937.

On June 10, 1936, The Belt Railway Company of Chicago published a tariff supplement canceling the allowance in conformity with the cease and desist order of the Interstate Commerce Commission, then to be effective July 17, 1936. Thereafter, and pursuant to the above mentioned order of the Commission postponing the effective date of its original order, the Belt Railway Company of Chicago filed further supplements postponing the cancellation of the allowance tariff down to the present time.

Similarly, on April 16, 1936, the Chicago & Illinois Western Railway published a tariff supplement canceling the allowance in conformity with the cease and desist order of the Interstate Commerce Commission, effective July 17, 1936. Thereafter, and pursuant to the above mentioned order of the Commission postponing the effective date of its original order, the Chicago & Illinois Western Railway filed further supplements postponing the cancellation of the allowance tariffs down to the present time.

Meanwhile, plaintiff's petition to the District Court to set aside the Commission's order was filed September 2, 1936. Defendants United States and Interstate Commerce Commission filed answers to the petition. No answers were filed herein by the carrier defendants. On December 2, 1936, after hearing, upon statutory notice to the proper parties, an interlocutory injunction was entered by the statutory three-judge court, restraining enforcement of the above order and suspending the operation of the aforesaid cancellation supplements to the allowance tariffs. By the terms of this injunction, it was provided that any and all

sums due and payable to plaintiff by virtue of said allowance tariffs should be set up by the defendants on their books of account, to be paid over to plaintiff, or canceled, only upon further order of said court; and counsel for appellant agreed to this arrangement, without prejudice.

On April 27, 1938, the District Court entered its final decree dismissing the suit for want of equity and made its findings of fact and conclusions of law. The District Court sustained the Commission's order upon the authority of *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402, and found that the evidence of record before the Commission was sufficient to support its findings and order.

In its final decree the court further ordered in substance that all sums which had been set up on the carriers' books of account pursuant to the interlocutory injunction, as due and owing under the allowance tariffs, should be retained by said carriers in their general funds and said accounts canceled. The court made no findings of fact or conclusions of law in support of or bearing upon this phase of its decree.

On May 25, 1938, appellant filed with the District Court its motion to modify its final decree. After receiving briefs upon said motion, the District Court denied the motion by order issued June 13, 1938.

This appeal presents the question of the power of the specially constituted three-judge court to set aside and nullify the terms of a formal tariff, legally published and filed with the Interstate Commerce Commission which is of binding force under Sections 6 and 15 of the Interstate Commerce Act, to which sections such tariff conforms. Also involved is the power of the court to enforce a cease and desist order of the Commission, retroactively, in advance of the date upon which, by its own terms, the order became effective. The further question presented on this appeal

is the power of such court to provide in its decree for the enforcement of an order of the Interstate Commerce Commission in a suit to set aside and restrain said order, when such enforcement is not sought by the pleadings and was not prayed for in any cross petition. These questions have not been settled by previous decisions of the Court. It is submitted that they are novel and are substantial and important.

(D) Cases Sustaining Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction on this appeal:

- United States et al. v. American Sheet & Tin Plate Co. et al.*, 301 U. S. 402;
- United States et al. v. Pan American Petroleum Corp. et al.*, 82 L. Ed. 784;
- Virginian Railway Co. v. United States*, 272 U. S. 658, 71 L. Ed. 463;
- Beaumont, Sour Lake & Western Railroad Co. v. United States*, 282 U. S. 74, 75 L. Ed. 221;
- New England Divisions Case*, 261 U. S. 184, 67 L. Ed. 605;
- Louisville & G. R. Co. v. United States*, 242 U. S. 60, 61 L. Ed. 152;
- Interstate Commerce Commission v. Union Pacific Ry. Co.*, 222 U. S. 541, 56 L. Ed. 308;
- Florida East Coast R. Co. v. United States*, 234 U. S. 167, 58 L. Ed. 1267;
- Manufacturers R. Co. v. United States*, 246 U. S. 457, 62 L. Ed. 831;
- Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 63 L. Ed. 772;
- Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57, 65 L. Ed. 129;

The Los Angeles Switching Case, 234 U. S. 294, 58 L. Ed. 1319;

Merchants Warehouse Co. v. United States, 284 U. S. 501, 75 L. Ed. 1229.

Dated June 22, 1938.

NUEL D. BELNAP,

JOHN S. BURCHMORE,

Solicitors for Chicago By-Product Coke Company.

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